
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: Feb. 15, 1990

CASE NO. 90-ERA-12

In the Matter of

JERRY D. SMITH,
Claimant,

v.

TENNESSEE VALLEY AUTHORITY,
Respondent

Dorothy B. Stulberg, Esquire
For the Claimant

Justin M. Schwamm, Sr., Esquire
Brent A. Marquand, Esquire
For the Respondent

BEFORE: EDWARD TERHUNE MILLER
Administrative Law Judge

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

Statement of the Case

This case involves a complaint by Jerry D. Smith

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against the Tennessee Valley Authority (TVA) under §210 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851 (1982)(ERA). On August 14, 1989, Smith filed a complaint in the form of a letter dated August 9, 1989, addressed to the Office of the Administrator, Wage and Hour Division, alleging discriminatory action related to protected activity under the ERA. He specified on information and belief that his name and the names of others were 'on a "blacklist' prepared by TVA," but that he did not, at the time that he filed his complaint, have a copy of the "blacklist." Smith stated that he had previously filed three complaints under §210 of the ERA which the U.S. Department of Labor (DOL) had investigated.

By letter to Smith's counsel, Dorothy B. Stulberg, dated December 13, 1989, Bennie L. Edwards, District Director, Employment Standards Division, Wage and Hour Division, advised Smith of the results of its compliance actions. The date for issuance of the decision had been extended until December 13, 1989, by prior agreement of the parties. The letter advised that conciliation had not resulted in settlement, and that a fact investigation had been conducted which "did not verify that discrimination was a factor in the actions comprising [Smith's] complaint." It recorded the conclusion, in substance, that the allegations could not be substantiated, because there was no evidence that Smith "had completed the paperwork necessary to indicate his availability for employment at the Tennessee Valley Authority"; and because there was no evidence that Smith "had suffered any adverse action as a result of his inclusion on a list of pending Energy Reorganization Act cases prepared by TVA's Office of General Counsel."

Smith filed a timely request for a hearing by telegram received by the Chief Administrative Law Judge, DOL, on December 15, 1989. Notice of hearing and prehearing order dated December 22, 1989, was dispatched on that date in accordance with the requirements of 29 C.F.R. Part 24. Smith waived the time limit specified in 29 C.F.R. §24.6(b) by letter dated December 29, 1989.

[Page 3]

Issues

1. Has Claimant alleged sufficient facts to support a claim of discriminatory action against him by TVA under §210 of the Energy Reorganization Act of 1974?

2. Have the parties identified any disputed material facts which preclude an award of summary judgment?

TVA's Motion for Summary Judgment

TVA contends that it is entitled to summary judgment dismissing Smith's complaint "that a status report on various ERA-related matters attached to a May 25, 1989, TVA memorandum from TVA's General Counsel to his client--TVA's Senior Vice President, Nuclear Power--is an illegal action under ERA." The gist of Smith's contention is that the status report, collectively with the memorandum referred to hereafter as "the list," is a

"blacklist," the preparation and dissemination of which was generated with discriminatory intent, and is inherently discriminatory under ERA.

In its supporting memorandum TVA recites a history of Smith's prior complaints, and thus concedes that Smith has engaged in previous protected activity. However, TVA contends that, because Smith has not been employed by TVA since August 31, 1988, when he was terminated as part of a major reduction in force by TVA, and because Smith has not applied to TVA for reemployment, despite certain preferences that he might have had, Smith cannot claim that the list has injured any of his employment opportunities or constitutes a "blacklist" as to him.

TVA also alleges that the list was intended to serve certain legitimate business purposes, that it was a legitimate communication between a lawyer and his client, a newly appointed Senior Vice President responsible for nuclear power, that the descriptions of protected ERA activity were neither infammatory nor pejorative, and that all of the significant information was a matter of public record. TVA contends that there is no evidence to support any allegation that the list was intended to discriminate against any pending or previous ERA complainants. TVA contends that Smith himself had publicized his whistleblower activities in the media. TVA has filed three affidavits in support of its factual allegations.

Based on these allegations, TVA contends that Smith's complaint does not satisfy the standards defining blacklisting that were recognized by the Secretary of Labor in *Faulkner v. Olin Corp.*, 85-SWD-3 at 23, 25 (Aug. 16, 1985), *aff'd* Nov. 18, 1985. Those standards require evidence that contacts "intending to harm" were made on behalf of the employer, and that "substantial evidence" establish that contacts between an employer charged with blacklisting and a party that allegedly acted on the basis of the blacklisting may have caused a failure to hire or some other discriminatory action. TVA contends that maintenance and circulation of a list identifying protected employees is not *per se* discriminatory. Therefore, TVA contends, in substance, that, because there is no extrinsic evidence of wrongful purpose and no allegation or evidence of actual adverse action against Smith on the basis of the list, TVA is entitled to summary judgment dismissing the complaint with prejudice.

Smith's Response in Opposition to the Motion

Smith contends in response to TVA's motion that there can have been no purpose for the preparation and distribution of the list except to provide TVA officials with a listing, in effect, a "blacklist," of individuals who dared to "attack" TVA safety, in order to discourage TVA employees from filing charges, and to prevent those terminated from finding employment. Why the list of names was distributed, why Smith's name was on the list, and why TVA put the list on a computer system which could be accessed by anyone on the TVA computer system, are factual questions identified by Smith which

underlie whether there was a retaliatory motive for preparation and dissemination of the list.

Smith contends that such a "blacklisting" is *per se* a discriminatory action and violation of the Act. In this regard, Smith contends that such a "blacklist" would encourage TVA supervisors to take action against those who have engaged in protected activity and discourage other employees from participating in safety activities. He also contends that TVA should have known that the list, once broadly distributed within TVA, would become available outside and within the nuclear industry. Where such actions are foreseeable and would "inescapably flow from the

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[Page 5]

action," Smith contends that good faith is not a defense.

Smith also challenges the credibility of the business purposes alleged by TVA, and the credibility and relevance of TVA's allegations regarding his reemployment efforts. Smith asserts, therefore, that he has proved a *prima facie* case, that there are material facts in issue, and that, as a consequence, the burden shifts to TVA to prove at a hearing that the preparation and distribution of the list, notwithstanding its inherently discriminatory distribution and form, would have been carried out as it was, regardless of Smith's protected activity.

Smith does not allege any specific injury or impairment of employment related interests except embarrassment and emotional and physical harm of an unspecified type. Smith contends in this regard that publication of the list was enough to cause damage to him, because "[t]o know that such a list has been prepared and distributed throughout the TVA Valley is enough to cause emotional and physical harm," embarrassment and humiliation, although he is not necessarily able to show specific damage caused.

Discussion and Conclusions of Law

The elements of a "whistleblower" complaint under the ERA may vary somewhat with the factual circumstances, but Smith must allege, and, to prevail, must ultimately establish, that he is an employee and that TVA is an employer under the ERA; that he was discharged, or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment, or "in practically any job related fashion'"; and that the alleged discrimination is causally related to his participation in an activity protected under the ERA. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984); *see also, McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

It is not disputed that Smith has engaged in the past in protected whistleblower activity which involved several legal actions against TVA. The particulars of Smith's

[Page 6]

protected activity are not relevant or material to the resolution of the pending motion. It is not disputed that Smith left the employ of TVA when he was terminated as part of a large reduction in force in August 1988, and that he has not sought reemployment with TVA. It is not disputed that he is an employee and that TVA is an employer for purposes of this complaint under the ERA.

Although the list is not in the record, excerpts relating to Smith have been referred to in TVA's supporting memorandum and are not in dispute. These excerpts included descriptions of legal actions by Smith against TVA which were related to protected whistleblower activity.[1] Because of these references, I find that the preparation and dissemination of the list is causally related to Smith's protected activity.

Thus, the only element of the complaint which is in issue is whether the preparation and dissemination of the list as alleged constituted a discriminatory action by TVA against Smith within the purview of the ERA, and whether the complaint alleges material facts in dispute which require a hearing for resolution.

In effect, Smith contends that the list and the fact of its dissemination, without more, is a discriminatory act, because the list constitutes a "blacklist," which is inherently discriminatory. TVA contends, in effect, that the preparation and dissemination of the list is not discriminatory action, and that actual employment related injury must be alleged and shown to be attributable to the discriminatory action. TVA also asserts, in effect, that allegations of nonspecific or theoretical injuries are not sufficient to establish discriminatory action.

Not every list prepared by an employer which refers in some way to protected activity is discriminatory under ERA. There must be some objectively manifest personnel or other injurious employment related action by the employer against the employee, proved directly or circumstantially, to support a claim of illegal action under the statute. *Cf. Weihaupt v. AMA*, 874 F.2d 419, 426 (7th Cir. 1989); *McDaniel v. Mead Corp.*, 622 F. Supp. 351, 358 (W.D. Va. 1985), *aff'd*, 818 F.2d 861 (4th Cir. 1987). Smith has neither alleged

[Page 7]

nor submitted evidence of any actual injurious employment related action by TVA other than, or subsequent to, preparation and dissemination of the list. Smith does not allege any particular effect upon the terms and conditions of his employment, or any refusal to hire subsequent to or related to the list. He alleges only embarrassment and emotional and physical distress stemming from his knowledge of the existence of the list.

Smith does not dispute TVA's allegation that his whistleblower activities identified on the list have been extensively publicized in the press. Nor does he dispute the allegation that the actions identified on the list were matters of public record. Smith has established no standing to complain on behalf of others who may have been identified on the list. Smith has cited no authority, and I have discovered none, that renders such amorphous injuries as he alleged, absent an employment nexus, cognizable under the ERA.

Smith relies on the proposition that the list is a "blacklist," which is discriminatory *per se*. He argues that, if the list be so characterized, he has proved his case, since adverse and discriminatory effects from preparation and distribution of such a list are foreseeable and would inescapably flow from the action of preparing and disseminating such a blacklist. He contends that the inherently discriminatory nature of a blacklist is expressly recognized in 29 C.F.R. §24.2(b).

"Blacklisting, being both insidious and invidious, cannot easily be discerned. There may be a considerable lapse of time before a blacklisted employee has any basis for believing he is the subject of discrimination." *See Egenrieder v. Metropolitan Edison Company/G.P.U.*, 85-ERA-23, 1 OAA 2, p. 425. However, it must also be recognized that the term blacklist is a generic term that may mean any one of a variety of things, and may, for instance, be a list of persons identified for special adverse treatment by those who prepare the list, or by those among whom the list is intended to circulate. A blacklist commonly refers to an exchange of information among employers identifying discharged employees in order to prevent their reemployment. *See generally*, 48 *Am. Jur. 2d*, Labor & Labor Relations §21

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at 93-94 (1979). It should also be recognized, however, that, in the analogous context of actions under antiblacklisting statutes, the mere allegation that the plaintiff has been blacklisted, as defined by the statute, has been held insufficient to state a cause of action, "because the term 'blacklist' has no such well defined meaning in law as to make its use in pleading a definite charge of specific misconduct against a person so charged." The complaint must show that the employer's statement was communicated to a prospective employer or reached a prospective employer contacted by the plaintiff, and that the plaintiff was refused employment by reason of the wrongful act. *See generally, Id*. at 96-97.

Absent compelling authority, I reject the proposition implicit in Smith's argument, that every listing by an employer which refers to protected whistleblower activity is a blacklist and, therefore, inherently discriminatory. The proposition has been rejected in analogous contexts. *Cf. McDaniel, supra; Weihaupt, supra*. Absent the essential allegations and related proof which would establish the existence of a blacklist, 29 C.F.R. §24.2(b) is not properly invoked. The contents of the list, to the extent material and as established in the record, are not disputed. Only the motive behind the preparation and dissemination of the list is in dispute. TVA asserts that the preparation and dissemination

of the list was undertaken for a variety of legitimate and nondiscriminatory purposes. The purposes stated by TVA are plausible, reasonable, and not improper as described. TVA supports its position with affidavits. Smith challenges the motive behind the preparation and dissemination of the list, implying that the stated reasons for preparation and dissemination of the list are a pretext for discriminatory action. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

In responding to a motion for summary judgment, Smith is not required to prove that TVA's articulated business reasons for its action are pretextual. He is required,

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[Page 9]

however, to present sufficient rebuttal to create a genuine issue of material fact. If he cannot produce, and has not produced, sufficient evidence to create an inference of discriminatory motive, the employer's articulated business reasons for its action remain unrebutted, and summary judgment is appropriate. *Cf. Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983). Smith has relied on the proposition that by preparing and disseminating the list referring to Smith's whistleblower activities, TVA has created a "blacklist" which is inherently discriminatory. Because Smith contends that a blacklist constitutes discriminatory action *per se*, he has not alleged any actual employment related injury attributable to the alleged discriminatory action.

I reject the claim that the preparation and dissemination of the list is discriminatory *per se* on the record before me. Mere allegation of a discriminatory motive is not enough, at least, as here, where the list is not clearly discriminatory on its face, and Smith has neither alleged nor identified evidence which would establish that the list was actually used in a discriminatory manner against him or had discriminatory, employment related consequences actually affecting him.

I find that there are no material facts in dispute. The question of TVA's motive is a disputed issue of law, but there are insufficient facts alleged which, if found to be true, would support a finding of discriminatory motive under the ERA, absent a determination that the preparation and dissemination of the list is *per se* an act of discrimination under the ERA. The considerations applicable to "dual motive" cases do not logically apply to the circumstances of record in this case. *See Mackowiak, supra*. I find, therefore, that the preparation and dissemination of the list as alleged and established in the record before me does not establish the element of discriminatory action proscribed by the ERA. TVA's Motion for Summary Judgment and to dismiss the complaint with prejudice should therefore be granted.

ORDER

The Motion of the Respondent TVA for summary judgment

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and to dismiss the complaint with prejudice is granted. The Notice of Hearing and Prehearing order is vacated, and this case is dismissed with prejudice.

EDWARD TERHUNE MILLER
Administrative Law Judge
Washington, D.C.

[ENDNOTES]

[1]The references in the list to Smith's activities quoted in TVA's supporting memorandum at 7-8, are as follows:

> 33. *Jerry Smith v. Tennessee Valley Authority*, Case No. 9-7-ERA-20 (pending). The Wage and Hour Division held in TVA's favor and complainant appealed. Upon complainant's request, the Administrative Law Judge dismissed the complaint on December 16, 1987. However, the complainant had alleged that TVA had exerted improper pressure on DOL, and the Judge certified that issue to the Secretary of Labor for investigation. Complainant had filed two earlier ERA complaints which were settled in August 1986. 4-5. *Jerry D. Smith v. Tennessee Valley Authority*, Civil Action No. 3-87-737 and MSPB Docket No. SL03518910241. Mr. Smith, a former nuclear engineer in the Nuclear Manager's Review Group and Nuclear Safety Review Staff, brought his civil action in the United States District Court alleging that TVA and a number of TVA managers had retaliated against him for expressing nuclear safety concerns. He alleged the same acts of discrimination raised in his ERA complaints (see [Para.] 33) and claimed that the August 1986 settlement was breached and/or invalid based on fraud. The court has granted our motion and dismissed all of the case except for the settlement claim. Mr. Smith was reduced in force in August 1988. Mr. Smith also has appealed his reduction in force to the Merit Systems Protection Board charging, among other things, that it was retaliatory. A hearing was held in this appeal on April 19, 1989, and we are awaiting a decision [citation omitted].

Smith contends that certain matters identified in the list had been settled or were not technically pending. However, I find that these issues are immaterial to resolution of the instant claim. Whatever their current status, those matters appear to qualify as protected activity, which is material.